

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEVEN ATUAHENE,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SEARS MORTGAGE CORPORATION,	:	
Defendant	:	NO. 98-930
Newcomer, J.		January , 2000

**M E M O R A N D U M**

Presently before this Court is (1) defendant's Motion to Dismiss and plaintiff's Response thereto; (2) plaintiff's Motion to Amend And/Or Supplement Original Pleadings; or for Leave of Court to Amend And/Or Supplement Original Pleadings; and (3) plaintiff's Motion for Leave of Court to Complete Service of Original Process Pursuant to Fed. R. Civ. P. Rule 4(m); and (4) Plaintiff's Motion for Enlargement of Time to Respond to Defendant's Motion to Dismiss. For the reasons that follow, this Court will GRANT defendant's Motion to Dismiss and dismiss this case.

**I. BACKGROUND**

In what has now become a long-drawn out case, plaintiff, a pro se litigant, brings the instant claims against defendant, plaintiff's former mortgage company, alleging violations of the Real Estate Settlement Procedures Act ("RESPA").<sup>1</sup> Plaintiff claims, inter alia, that defendant failed

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<sup>1</sup>Plaintiff's original Complaint included allegations based on the Truth in Lending Act ("TILA") and the Civil Rights Act, which were dismissed by this Court and then subsequently affirmed by the Circuit Court of Appeals.

to respond to his letters regarding his escrow account and instead provided incorrect and erroneous information to credit agencies in order to destroy his credit. Plaintiff contends that defendant destroyed his credit and business by foreclosing on a property formerly owned by plaintiff. While plaintiff's Complaint contains no factual or procedural background, defendant's instant Motion, as well as representations made by the parties to this Court in previous conferences and motions, show the following facts:

On March 25, 1992, defendant PNC Mortgage Corporation of America, an Illinois corporation formerly known as Sears Mortgage Company, brought a mortgage foreclosure action in the Philadelphia County Court of Common Pleas against plaintiff Steven Atuahene, a Pennsylvania resident, and his real property located at 4831 N. 18th Street in Philadelphia. Service of the complaint was effected at said property, and a judgment in mortgage foreclosure was entered against plaintiff, by default, in December 1992 for the amount of \$17,067.97.

In January 1993, plaintiff filed a Petition to Open or Strike Default Judgment, claiming that PNC should not have attempted to serve him at the above property because it was not his residence but a rental property, and the tenants being in default of their lease and fearing eviction, might have failed to cooperate with the process server. PNC answered the Petition to Open on February 17, 1993, denying the substantive allegations concerning service and pointing out that since no mortgage

payment had been made since June 1, 1991, Atuahene had failed to cite any evidence of a meritorious defense to the foreclosure action, such as payment. The state court denied the Petition to Open, by Order dated May 26, 1993.

In response, plaintiff filed a Notice of Removal of the Foreclosure Action on June 1, 1993, based on diversity jurisdiction; plaintiff's failure to file his Removal Notice on time, however, effectively defeated removal jurisdiction. Over the next four years, plaintiff took numerous steps to stay any execution proceedings by PNC against the property. After all of his attempts had been resolved in PNC's favor, PNC praeciped the Court of Common Pleas for a reissued writ of execution, and eventually the property was listed for Sheriff's sale for March 2, 1998. On February 24, 1998 in a last ditch effort to stay the Sheriff's sale, plaintiff filed the present action, seeking compensatory damages in excess of \$100,000, punitive damages, attorney's fees, and injunctive relief in the form of a stay of a sheriff's sale. Plaintiff simultaneously moved for a temporary restraining order prohibiting the Sheriff's sale.

On February 26, 1998, after conducting an emergency hearing via conference call on Plaintiff's Motion for a Temporary Restraining Order, this Court denied that Motion as plaintiff had failed to show a likelihood of success on the merits of his action. Thereafter, PNC proceeded with the Sheriff's sale on March 2, 1998, and the property was sold to PNC as the execution creditor. Defendant then moved to dismiss plaintiff's Complaint

on a number of different Rule 12(b) grounds. This Court granted said motion, holding that plaintiff's Complaint failed to state a claim.

Plaintiff appealed the dismissal of his Complaint to the Third Circuit. On June 23, 1999, plaintiff's appeal was granted in part, dismissing the civil rights claims without prejudice, while reversing and remanding for further proceedings the RESPA claims pleaded in Counts One, Three, Four, Five, Six, and Seven. Since the Opinion from the Circuit Court of Appeals was issued, defendant has filed another Motion to Dismiss. After an extended lapse of time and delay, plaintiff filed a Response to defendant's instant motion, although he has yet to amend his original Complaint. Pending before this Court is (1) defendant's Motion to Dismiss and plaintiff's Response thereto; (2) plaintiff's Motion to Amend And/Or Supplement Original Pleadings; or for Leave of Court to Amend And/Or Supplement Original Pleadings; and (3) plaintiff's Motion for Leave of Court to Complete Service of Original Process Pursuant to Fed. R. Civ. P. Rule 4(m). This Court will now address these motions in turn.

## **II. DISCUSSION**

### **A. PLAINTIFF'S MOTION TO AMEND**

Federal Rule of Civil Procedure 15(a) provides that "leave [to amend] shall be freely given when justice so requires." However, the grant or denial of an opportunity to amend is within the discretion of the district court, and among the grounds that can justify a denial of leave to amend are undue

delay, bad faith, dilatory motive, prejudice, and futility. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997).

In the instant case, this Court finds that plaintiff has had ample opportunity to amend and file an amended complaint pursuant to the Circuit Court's Opinion dated June 23, 1999. Plaintiff has had over 200 days to amend and file his complaint, yet he has failed to do so. This Court agrees with defendant's argument on page 5 of its Motion to Dismiss, that "[p]laintiff has not availed himself of the opportunity granted by the Court of Appeals to replead his civil rights claims." Accordingly, this Court denies plaintiff's Motion to Amend based on the undue delay that would necessarily result from such an amendment at this juncture.

Moreover, this Court notes that plaintiff has engaged in numerous delays throughout the history of this case. For example, plaintiff has delayed, without explanation, the service of his original complaint, the filing of his responses to defendant's motions, and in this instance, the filing of an amended complaint. This Court will not stand for such inexplicable dilatory conduct. This Court reprimands plaintiff for his delay in filing or responding to the various papers and motions throughout the course of this action and admonishes him to adhere strictly to all applicable procedures and deadlines in any future matters before this Court.

#### **B. MOTION TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)). Further, a pro se complaint, such as that in the case at bar, must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Defendant raises five separate grounds in its Motion to Dismiss: (1) a lack of subject matter jurisdiction; (2) a lack of jurisdiction over the person; (3) insufficiency of process under Federal Rule of Civil Procedure 12(b)(4); (4) insufficiency of service of process under Fed.R.Civ.P. 12(b)(5); and (5) failure

to state a claim upon which relief can be granted under  
Fed.R.Civ.P. 12(b)(6).

## 1. SUBJECT MATTER JURISDICTION

Plaintiff claims to establish proper subject matter jurisdiction based on diversity, violation of a federal statute, and violation of his civil rights.<sup>2</sup> In attacking jurisdiction based on diversity, defendant asserts that although the parties are diverse in the instant case, plaintiff has not sufficiently pleaded an amount in controversy of at least \$75,000, and plaintiff's Complaint does not contain any particularized allegations of actual damages, raising nothing more than a prayer for compensatory damages in excess of \$100,000. Defendant argues that plaintiff must establish by a preponderance of the evidence that he has in fact suffered actual damages of at least \$75,000 since defendant has questioned whether the alleged amount is legitimate. Defendant argues that the loss of ownership of the property does not satisfy the jurisdictional threshold for the amount in controversy. Specifically, defendant points to the \$17,067.97 amount of the mortgage loan at issue in the Foreclosure Action,<sup>3</sup> and representations made by plaintiff to this Court during a February 26, 1998 hearing on plaintiff's Emergency Motion for a TRO that the property at issue was worth

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<sup>2</sup>Plaintiff can no longer claim to have subject matter jurisdiction pursuant to his civil rights claims, as they were dismissed by this Court. The Circuit Court of Appeals subsequently affirmed the dismissal.

<sup>3</sup>Defendant also asserts that the issue in the Foreclosure Action is barred from being re-litigated by the doctrine of res judicata as a consequence of Judge Joyner's Remand Order in the Foreclosure Action, No. 93-CV-2746.

\$60,000. Defendant also argues that no federal statute applies in this case because RESPA, under 12 U.S.C. § 2606, does not apply to extensions of credit made for business purposes such as the purchase money mortgage for the rental property at issue here. Plaintiff counters defendant's argument by summarily arguing in his Response that the "amount of controversy is more than the legal requirement of \$75,000," and that there is jurisdiction under "the RESPA mandate."

Diversity jurisdiction requires an amount in controversy of at least \$75,000 exclusive of interest and costs. 28 U.S.C. § 1332(a). In deciding whether to dismiss a motion under Fed.R.Civ.P. 12(b)(1), the court will ordinarily accept plaintiff's allegation that the amount in controversy exceeds the jurisdictional threshold. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1935). It is established, however, that the complaint must allege facts sufficient to determine whether the jurisdictional amount has been satisfied and not plead an amount solely to obtain federal court jurisdiction. Id. at 226. Once challenged, the party seeking to invoke the jurisdiction of the federal courts has the burden of proving its existence. Gibbs v. Buck, 307 U.S. 66, 72,; Bryfogle v. Carvel Corp., 666 F.Supp. 730, 732 (E.D. Pa. 1987). "[T]he burden is on the plaintiff to satisfy the court that the jurisdictional amount is really and substantially involved." Hamilton v. Hartford Accident & Indemnity Co., 425 F.Supp. 224, 226 (E.D. Pa. 1977).

Courts have used the "legal certainty test" to determine whether the requisite jurisdictional amount has been satisfied. Unless it appears to a legal certainty that plaintiff's claims are for less than the jurisdictional amount, the amount in controversy requirement will be satisfied. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). "Thus the plaintiff need only present allegations or proof that it is not clear to a legal certainty that [he] will not recover less than the jurisdictional amount. Ardrey v. Federal Kemper Insurance Co., 798 F.Supp. 1147, 1149 (E.D. Pa. 1992). Plaintiff need not show with certainty that a particular amount is involved and plaintiff is entitled to the benefit of the facts that can be proven at trial. Id.

This Court finds that plaintiff has not adequately pleaded a sufficient amount in controversy to qualify for diversity jurisdiction. This Court agrees with defendant; plaintiff raises nothing more than an unsupported prayer for compensatory damages in excess of \$100,000. Plaintiff does not allege any specific facts to support his specified prayer for damages in his Complaint. Furthermore, plaintiff fails even to attempt to prove any amount of damages in his Response to defendant's Motion to Dismiss, despite having the burden to do so. Therefore, in applying the "legal certainty test", this Court is not convinced that plaintiff has presented allegations or proof that it is not clear to a legal certainty that he will not recover less than the jurisdictional amount. In fact,

plaintiff has attempted to plead or prove nothing regarding his damages. Plaintiff's unsupported prayer for \$100,000 of damages is insufficient to satisfy this Court that he has properly pleaded the requisite amount in controversy.<sup>4</sup> Plaintiff fails to meet his burden and satisfy this Court that the jurisdictional amount is really and substantially involved. Accordingly, this Court determines that it lacks diversity jurisdiction over this matter.

Defendant's second argument that this Court lacks subject matter jurisdiction is based on 12 U.S.C. § 2606, which states in part that RESPA:

"[D]oes not apply to credit transactions involving extensions of credit-

(1) primarily for business, commercial, or agricultural purposes . . ."

12 U.S.C. § 2606(a). The coverage of RESPA is also outlined in 24 CFR § 3500.5(b)(2), which states as an exemption to RESPA, exactly as stated in 12 U.S.C. § 2606(a)(1), "an extension of credit primarily for a business, commercial, or agricultural purpose." Unfortunately, the caselaw on the coverage of RESPA is very sparse, and defendant has not provided this Court any cases upon which this Court can rely.

However, defendant's argument is still a persuasive one - that RESPA does not apply in the instant case because the property at issue is a rental property. This Court must agree

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<sup>4</sup>This is particularly true in light of defendant's contentions, and plaintiff's prior representations to this Court, regarding the value of plaintiff's property.

with defendant in light of plaintiff's failure to deny defendant's contentions with any allegations or evidence to prove otherwise, either in his Complaint or in his Response to defendant's Motion.<sup>5</sup> Again, as with the amount in controversy, the party invoking federal jurisdiction bears the burden of establishing the elements of jurisdiction. See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). This Court determines that plaintiff has failed to respond sufficiently to defendant's arguments and Motion and has failed to meet his burden.

Even after taking the allegations of his Complaint as true, this Court finds that plaintiff fails to show that the primary purpose of his property was for something other than a commercial or business purpose. First, the Complaint is sorely devoid of basic facts as to this case and plaintiff does nothing to supplement the Complaint or provide evidence to this Court supporting his arguments. Second, the Complaint actually suggests in numerous places that the property was maintained for business purposes. The Complaint is replete with allegations that plaintiff's "businesses" were destroyed and that plaintiff suffered "loss of earnings and income" resulting from defendant's

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<sup>5</sup>As far as this Court is aware, since plaintiff does not provide any factual background in his Complaint or Response, plaintiff's property is a rental property in which he does not reside. He argued as such in January 1993 when he asserted that the property at issue was not his residence but a rental property and that it was a place where process of service would be improper.

alleged acts. Because plaintiff has failed to produce any evidence contrary to defendant's contentions, this Court finds that plaintiff has failed to carry his burden to show how this dispute avoids the business purpose exemption of RESPA. This Court finds that RESPA does not apply in the instant action. Accordingly, this Court grants plaintiff's Motion to Dismiss because this Court lacks subject matter jurisdiction over the matter, and defendant's action is hereby dismissed.

**2. LACK OF JURISDICTION OVER THE PERSON, FAILURE TO EFFECT PROPER SERVICE OF PROCESS, AND INSUFFICIENCY OF PROCESS**

Despite having already dismissed plaintiff's action for a lack of subject matter jurisdiction, this Court will address plaintiff's failure to effect proper service, which is the grounds for defendant's next three arguments for dismissal. Defendant asserts that this Court lacks personal jurisdiction over the defendant because, to date, plaintiff has not served upon defendant the Federal Complaint and Summons by any proper means. Defendant argues that a federal court lacks jurisdiction over a defendant which has not been properly served with the summons and the complaint as required by the Federal Rules of Civil Procedure. Defendant refutes the argument that it agreed to accept or otherwise waive proper service of process or waive personal jurisdiction in the instant case.<sup>6</sup>

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<sup>6</sup>Defendant also contends that it received notice of the instant lawsuit from defendant's foreclosure counsel, who forwarded an unsigned copy of the Complaint and Summons.

(continued...)

As to personal jurisdiction, plaintiff counters defendant's argument by claiming, without further explanation, that defendant used illegal tactics to avoid receiving service, which should not prevent jurisdiction over the person. Plaintiff contends that defendant conceded to jurisdiction over the person by stating in its Opposition for Enlargement: "the identity of defendant's (and its successor's) agent for service of process in Pennsylvania is available by a telephone call to the Pennsylvania Department of State Corporation Bureau." In addition, plaintiff asserts that the issue of personal jurisdiction is moot because defendant does business in the Philadelphia area. Regarding the insufficiency of process, plaintiff claims through inference that defendant has intentionally avoided service of the Complaint and Summons, which plaintiff argues defendant cannot do because of his Fourteenth and First Amendment rights to serve defendant.

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<sup>6</sup>(...continued)

Defendant's foreclosure counsel had received its copy by telecopy. Defendant argues that plaintiff did not serve the Federal Complaint and Summons upon any officer, managing general agent, or other authorized agent for receipt of service of process as required by the applicable Federal Rules of Civil Procedure because defendant has never authorized its foreclosure counsel to accept service of process on its behalf. Moreover, neither defendant nor its authorized agent have received or executed return receipts for service of original process by mail, which is a constitutionally acceptable means of providing actual notice. Defendant also asserts that the record before this Court does not reflect that service of original process was even attempted by plaintiff.

This Court finds it unnecessary to address these arguments concerning the insufficiency of service, however, because the record does not show, nor does plaintiff contend, that there was ever even an attempt to serve the Complaint and Summons upon defendant using its foreclosure counsel as an agent.

If service of process is not effectuated within 120 days of the filing of the Complaint, a court shall dismiss the Complaint. Fed.R.Civ.P. 4(m). However, a court should not dismiss a complaint for failure to properly effect service if the plaintiff shows "good cause" for the failure. Id. The burden of establishing that the defendant was properly served rests on the plaintiff. See Grand Entertainment Group v. Star Media Sales, 988 F.2d 476, 488 (3d Cir. 1993).

This Court finds that plaintiff has not yet effectuated valid service of process upon defendant and that plaintiff has failed to show good cause for the failure of service. Despite his allegations that defendant used illegal tactics to avoid receiving service, plaintiff does not enumerate or show any evidence of how this was done. Rather, plaintiff only argues that defendant conceded personal jurisdiction by providing an avenue for plaintiff to effectuate service of process in its Opposition to Plaintiff's Motion for Enlargement of Time. Plaintiff's argument does not make sense to this Court. While it may be true that defendant may be served in Philadelphia and may avail itself to the jurisdiction of this District Court, the fact remains that plaintiff has never served the Complaint and Summons even after 22 months! As noted by the Court in Kumar v. Temple University Cancer Center, CIV.A. No. 95-7832, 1996 WL 363915 (E.D. Pa. July 1, 1996), a determination of whether "sufficient contacts" exist for this Court to exercise jurisdiction is unnecessary because the issue of validity of service is not one

of constitutional due process, but rather one of compliance with the Federal Rules of Civil Procedure. See Kumar, 1996 WL 363915 at \*1, n.4 (citing Gottlieb v. Sandia American Corp., 452 F.2d 510, 511 (3d Cir. 1971)). Therefore, plaintiff's arguments as to defendant's contacts with this state are academic and do not apply for the purposes of the instant motion.

Plaintiff also makes bare allegations through inferences in his Response that defendant intentionally avoided service of the Complaint and Summons. He does this by arguing that defendant filed a Motion to Dismiss the Complaint after 84 days of the filing of the Complaint to prevent being served within the mandated 120 days after filing the Complaint. Plaintiff does not explain how the filing of defendant's Motion to Dismiss prevented him from serving his Complaint within 120 days of the filing of his Complaint. Moreover, plaintiff fails to explain why he failed to serve the Complaint after the Circuit Court of Appeals ruled in his favor, which allowed him sufficient time to serve the Complaint even after the Motion to Dismiss was taken care of. This Court determines that plaintiff has failed to satisfy his burden that defendant was properly served and also, that he had "good cause" for failing to serve defendant. Accordingly, this Court find that it lacks personal jurisdiction over defendant because of plaintiff's failure to serve him properly with the Complaint and Summons.

This Court will not address defendant's remaining arguments concerning the failure to state a claim.

O R D E R

AND NOW, this        day of January, 2000, upon consideration of the following motions and responses thereto, this Court hereby ORDERS as follows:

(1) Plaintiff's Motion to Amend And/Or Supplement Original Pleadings; or for Leave of Court to Amend And/Or Supplement Original Pleadings is DENIED.

(2) Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to F.R.Civ.P. 12 is GRANTED and this case is hereby dismissed.

(3) Plaintiff's Motion for Leave of Court to Complete Service of Original Process Pursuant to Federal Rule of Civil Procedure Rule 4(M) is DENIED as moot, this Court having already dismissed the above-captioned action.

(4) Plaintiff's Motion for Enlargement of Time to Respond to Defendant's Motion to Dismiss is DENIED as moot, plaintiff having already filed his Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Civil Action.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.